

May 15, 2002

The Honorable Lawrence H. Mirel
Commissioner of Insurance
Department of Insurance and Securities Regulation
810 First Street, NE, Suite 701
Washington, D.C. 20002

Re: Application of WellPoint Health Networks Inc. regarding the
Conversion and Acquisition of Control of Group Hospitalization
and Medical Services, Inc.
Proposed Case Management Order

Dear Commissioner Mirel:

WellPoint Health Networks Inc. ("WellPoint") and CareFirst, Inc. ("CareFirst") appreciate the opportunity to comment on the Proposed Case Management Order, attached as Appendix 1 to the Preliminary Order dated April 5, 2002. We have reviewed the Proposed Case Management Order and wish to share our comments relating to (i) the characterization of the public hearing as a "contested case" hearing and (ii) the applicability of discovery rights to the public hearing. All comments herein are subject to the change of which we have advised you occasioned by the enacted of Chapter 154 Laws of Maryland 2002. Under the Agreement and Plan of Merger between WellPoint and CareFirst, this legislative development entitles WellPoint to terminate the Agreement and Plan of Merger without any obligation. WellPoint expressly reserves the right to do so at any time.

As noted in the Preliminary Order, the Application submitted by WellPoint and CareFirst implicates the public hearing authority of the Commissioner under both D.C. Official Code § 31-703 (Acquisition of Control) and D.C. Official Code § 31-3515 (Conversion). You have concluded that a public hearing will be held to address all issues presented under both statutes. However, the procedural underpinnings for the public

hearing under § 31-703 and § 31-3515 are fundamentally different. These differences should be reflected in the final Case Management Order to be issued in July 2002.

A proceeding under § 31-3515 is not a contested case. “Contested case” is defined as “a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency” D.C. Official Code § 2-502(8). The conversion statute under the Hospital and Medical Services Corporations Regulation Act provides in pertinent part: “The Mayor *may* conduct a hearing concerning the proposed conversion of a corporation into a for-profit stock insurance company before deciding whether to approve it.” (emphasis added) § 31-3515(g). Because the hearing is discretionary, it is not a contested case hearing for purposes of the Administrative Procedure Act. *See Francis v. Recycling Solution, Inc.*, 695 A.2d 63 (D.C. 1997) (possibility of holding a discretionary hearing does not meet the “required by law” element of a contested case); *Timus v. District of Columbia Dep’t of Human Rights*, 633 A.2d 751 (D.C. 1993) (to constitute a contested case, hearing must be “compelled” by statute or Constitution). In contrast, the hearing prescribed in § 31-703(g) relating to the change of control of a domestic insurer is a contested case hearing because it is “required by ... law.”

Because the public hearing to be conducted by the Commissioner will not, in its entirety, be a contested case hearing, the Final Case Management Order should be revised to reflect the respective rights and obligations of the parties and interested persons. D.C. Official Code § 2-509 provides that, in contested cases, “[e]very party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” In addition, § 31-703(g)(2) provides that certain persons “shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in the Superior Court of the District of Columbia.” Thus, the component of the public hearing that concerns change of control issues arising under § 31-703(g)(1) may be addressed by parties through discovery, oral and documentary evidence, and examination and cross-examination of witnesses. In contrast, parties to the proceedings (with the exception of the Department) will not have a right to conduct discovery or examine or cross-examine witnesses concerning any of the issues arising under § 31-3515. Rather, the parties’ involvement in that aspect of the hearing will be limited to the submission of oral or written statements as “interested persons.”

For the foregoing reasons, we believe that the first sentence under Paragraph 1(A), relating to Parties, should be revised as follows:

Parties shall have all of the rights and duties prescribed by D.C. Official Code § 2-509(b) of the District of Columbia Administrative Procedure Act and D.C. Official Code § 31-703(g)(2) of the Insurance Holding Company System Act, ~~and D.C. Official Code § 31-3515 of the Hospital and Medical Services Corporation Regulatory Act~~, including the right to present evidence, examine and cross-examine witnesses, offer oral and written arguments, and conduct discovery proceedings.² As the Applicant, WellPoint shall be a Party to this proceeding. The DISR staff may offer argument and documentary and testimonial evidence, including cross-examination of any Party's witnesses and shall participate in this proceeding and the formal administrative hearing ("Public Hearing") to the same extent as a Party. Any other person who wishes to participate as a Party with respect to the issues arising under D.C. Official Code § 31-703(g)(2) shall file with the Department a motion to intervene no later than the Intervention Cut-Off date, July 30, 2002. The motion to intervene shall identify the nature of the proposed intervenor's interest in the § 31-703 proceeding, state how the outcome of the § 31-703 proceeding will or may affect the proposed intervenor, describe any other factors that would support the proposed intervenor's participation as a Party to the § 31-703 proceeding and any relief sought....

Further, the following sentence should be added under Paragraph 1(B):

Persons who do not wish to intervene as a Party under § 31-703(g)(2) and all persons (other than the DISR) who wish to participate under § 31-3515 shall be Interested Persons. Interested Persons will be given a reasonable opportunity to offer oral or written statements at the Public Hearing on the Application....

Finally, Paragraph 4 should be revised as follows:

Any person participating in this proceeding as a Party shall have the right to conduct discovery proceedings.³ The scope of discovery shall be limited to the matters enumerated in §

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31-703(g)(1). All discovery requests shall be served not later than thirty (30) days in advance of the Discovery Completion Date, October 4, 2002.

We believe that these revisions to the Proposed Case Management Order ensure that you will have the benefit of a wide diversity of analysis and opinion to assist you in your consideration of both the conversion and acquisition facets of the Application while fulfilling the mandates of the Administrative Procedure Act relating to public hearings. With these three noted revisions, and subject to the qualification set forth in the first paragraph relating to WellPoint's obligation to go forward in light of the Maryland legislation, WellPoint and CareFirst support the Proposed Case Management Order as drafted. Once again, we appreciate the opportunity to review and comment upon the Proposed Case Management Order.

Sincerely,

Ren L. Tundermann

cc: Raymond Santora, Assistant Corporation Counsel
Dana G. Sheppard, Senior Counsel
Frederick K. Campbell, Mitchell Williams